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**ROSENMAN & COLIN**

1300 19TH STREET, N.W., WASHINGTON, D. C. 20036

TELEPHONE (202) 463-7177

TELECOPIER (202) 429-0046

NEW YORK OFFICE  
575 MADISON AVENUE  
NEW YORK, NY 10022-2585  
TELEPHONE (212) 940-8800

SAMUEL I. ROSENMAN (1896-1973)  
RALPH F. COLIN (1900-1985)

August 22, 1994

HOWARD J. BRAUN

Via Hand Delivery

William F. Caton, Acting Secretary  
Federal Communications Commission  
Washington, D.C. 20554

**RECEIVED**

**AUG 22 1994**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

Re: GC Docket No. 92-52  
Reexamination of Policy Statement On  
Comparative Broadcast Hearings

Dear Mr. Caton:

Enclosed for filing in the above-referenced proceeding, on behalf of our client, Shockley Communications Corporation, are an original and nine (9) copies of "REPLY COMMENTS OF SHOCKLEY COMMUNICATIONS CORPORATION and MOTION TO STRIKE COMMENTS OF TAK COMMUNICATIONS, INC." in this proceeding.

Please direct all responsive communications concerning this matter to the undersigned.

Very truly yours,



Howard J. Braun

cc: As on Certificate of Service  
(all w/enc.)

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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
 Washington, D.C. 20554

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'AUG 22 1994

In the Matter of )  
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 Reexamination of the Policy )  
 Statement on Comparative )  
 Broadcast Hearings )

GC Docket No. 92-52

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

TO: The Commission

REPLY COMMENTS OF SHOCKLEY COMMUNICATIONS CORPORATION and  
MOTION TO STRIKE COMMENTS OF TAK COMMUNICATIONS, INC.

**SHOCKLEY COMMUNICATIONS CORPORATION** ("SCC"),<sup>1</sup> by its attorneys, pursuant to §1.415(c) of the Commission's Rules, hereby replies to the "Comments of Tak Communications, Inc." ("Tak Comments") in response to the Second Further Notice of Proposed Rulemaking ("SFNPR"), FCC 94-167, released July 22, 1994, and requests that the Commission should strike the Tak Comments as procedurally and substantively inappropriate in this proceeding. In support whereof, SCC shows the following:

1. The Commission issued the SFNPR with the limited purpose of soliciting suggestions for revised standards for choosing among competing applicants in new-station comparative broadcast hearings. Id. at ¶7. Nowhere in the SFNPR does the Commission request comments pertaining to the entirely separate question of comparative standards for license renewal

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<sup>1</sup> SCC is licensee of Stations KDAL(AM) and KDAL-FM, Duluth, Minnesota; WOLX-FM, Baraboo, Wisconsin; and WZTR(FM), Milwaukee, Wisconsin. It has also filed four mutually-exclusive new-station applications against pending license renewal applications for Tak's television stations at Madison, LaCrosse, Eau Claire, and Wausau, Wisconsin. See Paragraph 2 below.

proceedings, nor does the Commission even reference in the SFNPR its separate and ongoing proceeding in BC Docket No. 81-742, which is specifically dedicated to that topic. See Formulation of Rules and Policies Relating to Broadcast Renewal Applicants, 3 FCC Rcd 5179 (1988); 4 FCC Rcd 4780 (1989); recon. denied, 5 FCC Rcd 3902 (1990).

2. Nevertheless, the Tak Comments (at 2) assert that they "address the FCC's comparative criteria insofar as they may apply to comparative license renewal proceedings" (emphasis added). Tak also candidly reveals (at 1-2) that the actual and sole reason for its pleading is that "Tak's license renewal applications for its Buffalo, New York and Wisconsin television stations are the subject of competing applications that have not been designated for hearing". (As indicated in footnote 1, supra, SCC filed the "competing applications" against Tak's four Wisconsin television stations.) Finally, Tak states (at 2):

To the extent Tak's Comments may be deemed more suitable for consideration in the unresolved Comparative Renewal proceeding, Tak urges the Commission to reactivate that proceeding with these Comments in mind.

As SCC will now demonstrate, the Tak Comments should be stricken from this proceeding as procedurally and substantively inappropriate. The Commission should also strike any other rulemaking comments filed herein to the extent that, like the Tak Comments, they address license renewal issues

that have nothing to do with the comparative standards for new-station broadcast applications.<sup>2</sup>

3. SCC urges that the regularity, efficiency, and propriety of a notice and comment rulemaking proceeding under §553 of the Administrative Procedure Act, 5 U.S.C. §553, such as the instant proceeding, are seriously undermined if the Commission accepts and considers Comments, such as Tak's, which clearly are unrelated to this proceeding. Substantively, SCC urges that giving any weight to the Tak Comments here is inappropriate because the issues which Tak raises -- concerning "renewal expectancy" and whether the Commission should adopt a "bifurcated renewal procedure for broadcast applicants similar to that adopted for cellular applicants" -- are wholly separate and discrete from the development of revised comparative criteria for new-station applications, which is the sole concern of the SFNPR. Thus, properly-focused Comments and Reply Comments filed herein have no bearing on the merits of the Tak Comments. Indeed, the Commission cannot properly adopt any revised license renewal standards in this proceeding, as Tak urges, because to do so would violate reasoned policymaking and the dictates of the Administrative Procedure Act, supra.

4. SCC maintains that there are also two significant procedural barriers to consideration of the Tak Comments herein. First, Tak itself essentially concedes that this is

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<sup>2</sup> See, for example, the Comments filed on July 22, 1994 in this proceeding by Scripps Howard Broadcasting Company and by the National Association of Broadcasters.

not the correct rulemaking forum for its views; BC Docket No. 81-742, the comparative renewal proceeding, is. See Paragraphs 1-2 above. To accept and act upon the Tak Comments here will render meaningless the different filing deadlines and subject matter limitations in this proceeding and in BC Docket No. 81-742 in violation of the letter and spirit of the Administrative Procedure Act, supra.

5. Second, and most importantly, the March 23, 1993 pleading, entitled "Consolidated Petition for Expedited Action on Petition to Dismiss or, in the Alternative, for Prompt Designation for Hearing and Related Relief," which is appended to and incorporated by reference in the Tak Comments (at 6-7), and which makes the very same "renewal expectancy" arguments as the Tak Comments, was the subject of an April 7, 1993 "Opposition to Consolidated Petition" by SCC and a "Reply" by Tak. Thus, the authorized pleading cycle on this matter has long since been completed vis-a-vis Tak and SCC, and it is awaiting adjudication in another Commission forum -- the application-processing arm of the Mass Media Bureau. Hence, SCC submits that it is wholly inappropriate for Tak to again present the same issues in a rulemaking context and attempt to preempt or shortcircuit the Commission's application-processing activities or get a "second bite at the apple".

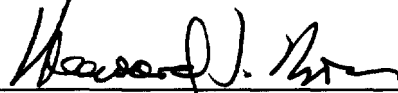
6. Put differently, SCC maintains that it is an abuse of the Commission's rulemaking process to have pre-designation broadcast applicants like Tak (or post-designation applicants) blatantly argue the merits of their comparative broadcast

cases in the guise of rulemaking "comments" when they ought to confine such presentations to the application adjudication process. The obvious bias in such "comments" -- in favor of the proponent's personal situation -- is so over-whelming as to completely vitiate any public interest value, and, as the instant case, it almost always amounts to a procedurally impermissible "second bite at the apple". For additional examples of such abuses, see the August 8, 1994 Reply Comments of Jerome Thomas Lamprecht and Maranatha Broadcasting Company, Inc., both of which unabashedly favor revised comparative broadcast standards to bolster their comparative standing in pending cases. SCC submits that such self-serving pleadings -- like the Tak Comments -- are an abuse of the rulemaking process and should be stricken.

WHEREFORE, in light of the foregoing, SCC respectfully requests that the July 22, 1994 "Comments of Tak Communications, Inc." should be stricken.

Respectfully submitted,

**SHOCKLEY COMMUNICATIONS CORPORATION**

By:   
Howard J. Braun  
Jerold L. Jacobs

ROSENMAN & COLIN  
1300 - 19th Street, N.W.  
Suite 200  
Washington, D.C. 20036  
(202) 463-7177

Its Attorneys

Dated: August 22, 1994

**CERTIFICATE OF SERVICE**

I, Yvonne Corbett, a secretary in the law offices of Rosenman & Colin, do hereby certify that on this 22nd day of August, 1994, I have caused to be mailed, or hand-delivered, a copy of the foregoing **"REPLY COMMENTS OF SHOCKLEY COMMUNICATIONS CORPORATION and MOTION TO STRIKE COMMENTS OF TAK COMMUNICATIONS, INC."** to the following:

Roy J. Stewart, Chief\*  
Mass Media Bureau  
Federal Communications Commission  
1919 M Street, N.W.  
Room 314  
Washington, D.C. 20554

Barbara A. Kreisman, Chief\*  
Video Services Division  
Mass Media Bureau  
Federal Communications Commission  
1919 M Street, N.W., Room 302  
Washington, DC 20554

Clay Pendarvis, Chief\*  
Television Branch  
Mass Media Bureau  
Federal Communications Commission  
1919 M Street, N.W., Room 700  
Washington, DC 20554

William E. Kennard, Esq.\*  
General Counsel  
Federal Communications Commission  
1919 M Street, N.W., Room 614  
Washington, DC 20554

David S. Senzel, Esq.\*  
Office of General Counsel  
Federal Communications Commission  
1919 M Street, N.W., Room 610  
Washington, DC 20554

Ralph W. Hardy, Jr., Esq.  
Thomas J. Hutton, Esq.  
Dow, Lohnes & Albertson  
1255 - 23rd Street, N.W., Suite 500  
Washington, DC 20037  
COUNSEL FOR TAK COMMUNICATIONS, INC.

Aaron Shainis, Esq.  
Shainis & Peltzman  
2000 L Street, N.W.  
Suite 200  
Washington, DC 20036

  
\_\_\_\_\_  
Yvonne Corbett

**\*BY HAND**